**Capital Parcel Delivery Company *and* Local 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Case 20-CA-14716

8 March 1984

## SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 2 June 1981 the National Labor Relations Board issued its Decision and Order in this proceeding.[1] The Board reversed the administrative law judge's contrary conclusion[2] and found that the Respondent violated Section 8(a)(5) and (1) of the Act by subcontracting all unit work to owner-operator delivery truck drivers, withdrawing recognition from the Union, terminating the collective-bargaining agreements, and discharging all the bargaining unit employees. The judge had recommended dismissal of the complaint because he found that the unit employees were replaced with independent contractors and that the reservation of rights clause in the collective-bargaining agreement permitted the Respondent to subcontract the unit work to independent contractors. The Board found, however, that the unit work was transferred to statutory employees and that therefore the discharge of the former employees during the contract term violated Section 8(a)(5) and (1) of the Act. The Respondent then filed a petition for review of the Board's Decision and Order and the entire matter was heard before the United States Court of Appeals for the Ninth Circuit.

On 22 October 1982 the court issued its order vacating the Board's decision and remanding the matter for reconsideration by the Board in light of the court's decision in *Merchants Home Delivery Service v. NLRB*, 580 F.2d 966 (1978), which, "although it involved the same rule of law applied to similar facts, was ignored by the Board in the instant case." The *Merchants* decision set forth a rule to distinguish between "employees" and "independent contractors" within the meaning of Section 2(3) of the Act and the disposition of this case is controlled by the Section 2(3) status of the owner-operators. If they are independent contractors, there is no 8(a)(5) violation because the contract allows subcontracting. If they are employees, a violation exists because the Respondent ceased honoring the contract.

The Board accepted the remand and invited the parties to file statements of position with respect to the issues involved. Such statements have been filed by the General Counsel and the Respondent.

The Board has considered further the entire record in this proceeding, including the statements of position and has decided to accept the court's decision in *Merchants* as the law of the case. We therefore accept, for the reasons summarized below, the judge's finding that the unit work was lawfully transferred to independent contractors and adopt his recommended Order dismissing the complaint in its entirety.[3]

The employer in *Merchants*, like the Respondent, was a contract carrier engaged primarily in the delivery of household appliances and furniture from department stores to the homes of the stores' customers. The *Merchants* court relied on *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968), and applied the general agency principles found in Restatement (Second) of Agency[4] to distinguish be-

[1] 256 NLRB 302.

[2] The Board accepted the judge's factual findings that the Respondent employs 16 drivers in its service of delivering furniture and delivering and installing appliances for several retail stores. Since 1975 the Respondent has had a contractual relationship with the Union covering employees who deliver for Montgomery Ward and Company. On 29 January 1979 the Respondent advised the Union that it was considering exercising its contractual right to subcontract unit work. On 2 February the parties discussed the Respondent's economic problems and the Union agreed to discuss a wage reduction with the employees. However, before that meeting could be held, the Respondent notified the Union that it would lay off all employees on the next day and subcontract all work under the "Reservation of Rights" clause in the contract. On 17 February the employees were laid off and the unit work was given to owner-operators. On 20 March the Respondent notified the Union that the employees were not entitled to severance or vacation pay on the grounds that they had not been terminated, but rather were "laid off for lack of work."

[3] The Respondent has filed a motion to reopen the record. The Respondent asserts as "newly discovered evidence" civil complaints filed in California state court in May 1982 by two owner-operators who testified as witnesses for the General Counsel in the December 1979 hearing in this case. The two plaintiffs allege a breach of contract by the Respondent's failure to pay agreed-upon compensation as set forth in agreements between plaintiffs and the Respondent. These agreements, already in evidence in this proceeding, characterize plaintiffs' status as independent contractors. We deny the Respondent's motion for two reasons. First, it was untimely filed approximately 9 months after the state court action commenced. Second, the motion is lacking in merit as the statements in these civil complaints by the owner-operators in asserting that they are not statutory employees are conclusory and self-serving for purposes of seeking an award in those state court proceedings.

[4] Restatement (Second) of Agency § 220 (1957) reads as follows:

Definition of Servant

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

*Continued*

tween employees and independent contractors. In addition to the critical factor of right of control, i.e., does the employer have the right to control not only the result but the manner and means by which the desired result is to be obtained, the court considered the entrepreneurial aspects of the individual's business, his risk of loss and opportunity for profit, and his proprietary interest in his business.

The *Merchants* court balanced both the "right to control" indicia and the entrepreneurial indicia. It found the former to be "somewhat inconclusive" but the latter to "tip decidedly in favor of independent contractor status." The judge in the instant case implicitly adopted the same two-prong analysis and arrived at a similar result. In examining the facts, we shall explicitly apply the two-prong test set forth by the *Merchants* court.

We begin by summarizing the facts and the judge's application of the right of control and the entrepreneurial criteria. Owner-operators were expected to report for work around 7 a.m., 5 days a week. Each owner-operator's workday was controlled by the trip manifest drawn up by the Respondent. After receiving the manifest, the owner-operators did their own fine routing which was reported either to the Respondent's dispatchers or to Ward's personnel. Loading procedures also were controlled by the manifest whereby the owner-operator loaded his last delivery first and his first delivery last. During the actual delivery run, all problems and schedule changes were to be reported to the dispatcher at 4:30 p.m. and again when all deliveries were completed. The dispatchers testified, however, that the reporting rules were most often honored in the breach.

As to the extent of control which the Respondent exercised over the details of the owner-operators' work, the judge found that the amount and kind of control varied. He noted as an example that originally the owner-operators felt no obligation to adhere to the Respondent's 7 a.m. starting time since they were not paid for loading time. However, the Respondent subsequently did unilaterally and without negotiations grant the drivers a loading time benefit. We agree with the judge that the significance of such attempts at control are ambiguous. He found that the loose enforcement of the starting time rule evidenced the owner-operators' independence, but that the unilateral addition of a loading time benefit arguably showed treatment of these persons as employees and probably was an attempt to control more closely the drivers' use of their time. He also noted, however, that it may simply have been an attempt to get the job done. In view of this change and other changes such that overtime drivers were granted greater independence in establishing their routes and calculating payments owed, he concluded that during the period in question control ebbed and flowed in different ways.

Several drivers testified that they were either denied loads or had their contracts canceled by the Respondent because of disputes over job performance. The judge similarly found this evidence of discipline not clearly indicative of control. He cited *Merchants*[5] for the proposition that "there is a difference between directing the means and manner of performance of work and exercising an ex post facto right to reprimand when the end result is unsatisfactory." The judge correctly stated that, while discipline may be evidence of the right to control, that sort of control is not conclusive in resolving the independent contractor/employee question.

Since the judge concluded that the physical control exercised by the Respondent over the owner-operators is "ephemeral" and "elusive," he stressed those criteria under the second prong of entrepreneurial factors in order to resolve the employment status of the drivers.[6]

The judge found that each owner-operator is engaged in a distinct business. While most do business as sole proprietorships, at least two appear to be partnerships and one is a corporation. Most owner-operators keep their own books and records. All of them hire and fire helpers and meet all Federal and state obligations as to withholding, taxes, and unemployment insurance. Each owner-operator has a substantial investment in his own vehicle which he could select at his discretion subject only to a size requirement. The Respondent has no financial interest in any of the drivers' vehicles.

Each owner-operator was required, without financial assistance from the Respondent, to obtain a c.o.d. bond and necessary permits, supply public liability and cargo insurance to protect against claims arising out of the operation of his truck, and bear all necessary costs of providing the transportation service. Further, under the subhauling agree-

(f) the length of time for which the person is employed;
(g) the method of payment by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.

[5] 580 F.2d 966 at 974.

[6] The judge also evaluated several Restatement criteria not directly related to either prong of the *Merchants* test and found them to be relatively neutral: area practice, necessary skills, length of time for which the person is employed, and whether the work is part of the employer's regular business.

ment, the owner-operators were free to haul for other companies when not hauling for the Respondent. Thus, they were assigned by the Respondent exclusively to Ward's whenever Ward's needed deliveries and during that time they did not haul for anyone else with the possible exception of the Respondent itself or another company controlled by the Respondent's president.

Moreover, for approximately 6 weeks following the conversion to the owner-operator system, the Respondent paid each owner-operator a fixed amount per hour. This amount was intended to cover all expenses as well as to provide recompense for labor. On 29 March 1979 the Respondent began paying drivers on a "per stop" basis which is a form of payment closely related to the "by the job" criterion in the Restatement indicative of independent contractor status. The judge reasoned that it is unlikely that employees would have worked for nothing even during the period in which loading time was not paid under the hourly system, and therefore the drivers who did so work can best be viewed as independent contractors. We agree with the judge that the later granting of loading time pay should be seen as an inducement by the Respondent to get the job done more effectively by its independent contractors.

Finally, the belief of the parties as to the nature of their business relationship is a criterion stressed by the judge. He found that both subhauling agreements clearly stated the parties' intention to create an independent contractor relationship. The Respondent and the individual owner-operators so agreed in their testimony.

Accordingly, following the test set forth in *Merchants Home Delivery Service*, above, we agree with the judge that while the control issue is relatively neutral the owner-operators' entrepreneurial characteristics are sufficient to render them independent contractors within the meaning of Section 2(3) of the Act. We therefore adopt the judge's recommendation to dismiss the 8(a)(5) complaint.

## ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.